

RECORD NO. 08-1424

IN THE

**United States Court of Appeals
FOR THE FOURTH CIRCUIT**

A. V. et al

Plaintiffs-Appellants

v.

iParadigms, LLC.

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Brief for Appellants

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 08-1424

Caption: A. V. et al v iPardigms, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

A.V., K. W., E.N., & M. N. who are appellants, each make
(name of party/amicus) (appellant/appellee/amicus)

the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
 YES NO

2. Does party/amicus have any parent corporations?
 YES NO

If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
 YES NO

If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
 YES NO

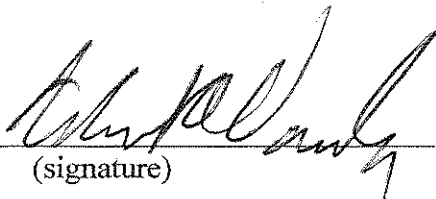
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)
 YES NO

If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

6. Does this case arise out of a bankruptcy proceeding?
 YES NO

If yes, identify any trustee and the members of any creditors' committee:


(signature)

May 18, 2008
(date)

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I. JURISDICTIONAL STATEMENT

The District Court's subject matter jurisdiction is provided by 28 U. S. C. §§1331 & 1338(a), and 17 U. S. C. §101 et seq. The facts establishing jurisdiction are that the appellants are owners of copyright registrations, and the appellee has assimilated the entirety of the copyrighted works into its database without permission. The facts relevant to the Court of Appeals are the same as those relevant to the District Court's jurisdiction, and the statutory basis is 18 U. S. C. §1291. The Final Order appealed from disposes of all of appellants' claims and is dated March 11, 2008; the Notice of Appeal was filed April 9, 2008.

II. STATEMENT OF THE ISSUES

Are there facts in dispute on the issue of copyright infringement, precluding a summary judgment determination of no copyright infringement because of "fair use"?

Are the infant appellants precluded, as a matter of law, from suing for the tort of copyright infringement by clicking "I agree – create profile" on a website that claims no liability for anything?

III. STATEMENT OF THE CASE

This is a copyright infringement case. The infant appellants own six copyright registrations. Appellee archived the entire unpublished (at the time

of submission) manuscripts that are the subject matter of the registrations in its database and refused to remove them. Suit was filed in March, 2007.

Appellee filed a motion to dismiss, which was denied. Appellee then filed four counterclaims, including one alleging that the infant appellants were responsible for its hundreds of thousands of dollars of attorney fees. That and another counterclaim have been dropped. Appellee also filed an answer alleging a click wrap “contract” precluded recovery, and that the archiving by appellee was “fair use”.

After the completion of discovery, Appellants filed for summary judgment on the four counterclaims and the alleged click wrap “contract”, and all other issues except for copyright infringement. Appellee filed for summary judgment on the click wrap “contract”, copyright infringement (alleging fair use), and other issues. Appellants opposed the copyright infringement summary judgment submitting that numerous facts in dispute regarding “fair use” precluded summary judgment.

The District Court granted appellants summary judgment on all the counterclaims. The lower court also granted appellee summary judgment on copyright infringement because of fair use, and because appellants had entered into a click wrap “agreement” with a limitation of liability clause that the lower court found enforceable even though they were infants.

IV. STATEMENT OF FACTS

As relevant to this case, appellee iParadigms represents that it provides an “anti-plagiarism” system, known as “Turnitin.com”, to educational institutions, including high schools in Fairfax County, Virginia [162-5]¹ and Phoenix, Arizona. The four infant appellants attend public high schools in those jurisdictions [22-3]. The public high schools require the appellants to submit unpublished manuscripts to Turnitin.com [22-3].

Turnitin.com runs a computer comparison of the students’ manuscripts to its database of millions of records, and then issues an “Originality Report” [see example at 127] including a “Similarity Index” indicating what percent of the manuscript is not “original material” (which, depending upon how the customer configures the system, might be material that is properly quoted and referenced by the student). With numbered notes the “Originality Report” relates the non-original material to an item in its database. iParadigms archives the entire submission by each student [including all those of the appellants -- 229] in a database, and retains it regardless of what the student’s instructions are. Teachers then ostensibly use the “Originality Report” to determine if the manuscript is plagiarized.

¹ Numbers within brackets reference page numbers in the Appendix.

Appellants are all infants, and have been at all times relevant to the issues in this case [23-5, 204]. Appellants are the sole owners of the copyright registrations at issue [23-5, 230-2]. iParadigms has received notice that appellants object to its archiving of their copyrighted works [91-92, 137, 204, 230].

One of the most important points used to sell iParadigms' system [88-90] is the constantly increasing database of student submissions, which it charges the students' schools for [162-5]. iParadigms keeps the entire content of student works submitted to it electronically [including the appellants' copyrighted works – 229] in the same format as submitted, and can and does regurgitate the works in that format to others [130, 140-153, 233]. The entire content, including any creative part, of an archived work is compared to other student papers about 125,000 times a day (the approximate number of times other student papers are submitted daily). iParadigms will send the archived works of infants to others around the world without the permission of the infant copyright owners, or their parents [130, 140-153, 233], and doesn't [211, 228], in fact cannot [195-6], keep track of who it sends the archived works to.

iParadigms retains, typically forever, confidential personally identifiable information [including name and class – see 78, 127, 130 for

examples] about public school students even after their manuscripts have been graded. That is, the archived copy of the manuscript with confidential information is not destroyed after comparison to the Turnitin database. In fact, iParadigms' usurps the student submissions and calls them its property [87-89].

iParadigms' use of the copyrighted works is commercial. iParadigms obtains large amounts of money from customers all over the world, although the cost per student is insignificant [less than \$1 per student – 210, 162-5].

The manuscripts are unpublished when submitted to Turnitin [19-27, 229], and contain fiction, poetry, and other creative expressions [96, 102].

To electronically submit a manuscript to Turnitin.com, the appellants were required to “sign on” to the Turnitin website by creating a user profile. At the time the infant appellants created their user profiles on the Turnitin system new users were presented with a screen that said [223, 207-8]:

“Create a user profile

Please read our user agreement below. Select “I agree” to complete your user profile.

I disagree – cancel profile

I agree – create profile”

Where the ----- are was the first paragraph of what purported to be a click wrap² “agreement” [223, 212, 208].

iParadigms has – since its motion to dismiss was denied in this case – changed the existing user sign-on procedure to require the existing user to sign on to the Turnitin.com web site again [208, 234]. The language surrounding the sign-on changed significantly. It was changed to read [234]: “Our user agreement has been updated. Please read our user agreement below and agree or disagree to the terms and conditions:

I disagree – logout I agree – continue”.

The “contract” [212-3] that the lower court found appellants assented to attempts to exempt iParadigms from all liability no matter what it does. However, 2006 in California, iParadigms filed a declaratory judgment complaint [154-161] against an organization including one of the appellants here [A. V.]. iParadigms’ complaint said evaluation of the tort of copyright infringement was necessary “to serve the interest of justice” [159].

V. SUMMARY OF ARGUMENT

The copyright infringement cause of action relates only to the archiving of manuscripts by iParadigms, not to the mere one-time

² A term used in the industry and case law to identify text that one “clicks on” with a computer mouse.

comparison of a copyrighted work to other documents in a database maintained by iParadigms.

The summary judgment decision denying copyright infringement because of “fair use” was erroneous as a matter of law since there clearly were facts in dispute with respect to “fair use”. Fair use is an equitable affirmative defense so the burden of proof is on iParadigms. While some courts have decided copyright fair use by summary judgment, because the issue is so fact specific under Supreme Court precedent summary judgment is the exception, not the rule.

Fair use is an “equitable rule of reason” allowing courts to find certain uses non-infringing where such uses benefit the public and further the overall purpose of the Copyright Act. With the public benefit foremost in mind, the fair use doctrine is evaluated using the four non-exclusive factors set forth in 17 U.S.C. § 107: (1) the nature of the use, e.g. is it commercial; (2) the nature of the copyrighted work, e. g. is it unpublished; (3) the amount of the work used; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Evaluating the §107 criteria here, all the four factors are clearly in appellants’ favor or there are facts in dispute. Evaluating the criteria in the context of their purpose – public benefit – it is even clearer that facts are in

dispute, although there are no facts in dispute that Turnitin's archiving violates federally mandated property rights. In fact, appellants have made out a *prima facie* case that the Turnitin system functions not for the betterment of society, but only for the economic betterment of iParadigms' stockholders. Summary judgment on fair use was improvidently granted.

As a matter of law, the alternative reason for granting summary judgment to appellee - the click wrap document and its limitation on liability are enforceable against the infant appellees - is erroneous. The click wrap document is not a contract, but even if it were, it has been voided by the infant appellants and is not enforceable for numerous reasons.

Even if appellants are wrongly construed to have entered into an agreement, it is irrelevant. The contract has no bearing on the tort (copyright infringement) action that is the subject of this suit. But even if the contract had some relevance, as infants appellants could unilaterally void it – which they did.

The law in Virginia is clear that not just defendant infants can unilaterally void contracts, but plaintiff infants can too. The fact that limitation of liability clauses for sophisticated businessmen are enforceable in Virginia has no relationship whatsoever to any contract here. The limitation of liability clause of the click wrap document is, even if relevant,

unconscionable here where the parties had grossly different levels of sophistication and bargaining power [appellants had none at all]. iParadigms' position is that it can commit any tort it wants yet it is protected by contract. This is clearly wrong as a matter of law, but even if it were correct, the unconscionable character of iParadigms' limitation on liability is dispositive.

There is also a judicial admission completely precluding iParadigms from now arguing that the click wrap document is an agreement enforceable to preclude determination of copyright infringement. The complaint filed by iParadigms in California attached the same "contract" it asserts here, and completely rejected the position that the click wrap document precludes a determination of the tort of copyright infringement. Instead, iParadigms specifically represented that the Court should consider copyright infringement/fair use.

When the appellants, while signing on to Turnitin.com, reached the screen with the click wrap document first paragraph, they were not asked to agree to the click wrap terms and conditions – they were only asked to "Select 'I agree' to complete your user profile". Therefore the selection of "I agree" did not bind appellants to the click wrap document.

VI. ARGUMENT

A. Standard Of Review

Since the lower court decided the case by summary judgment, this Court reviews the decision *de novo*, viewing the facts and inferences drawn therefrom in the light most favorable to appellants. *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir. 2004).

B. Discussion Of Issues

1. Introduction

iParadigms wants to teach kids not to be dishonest by stealing their property, and invading their privacy – a novel approach to be sure. In fact, iParadigms has had the haughty audacity to say that because the infant appellants were forced, or thought they would be forced, to submit their works to Turnitin.com by their schools on penalty of getting a Zero, the appellants are out to protect plagiarists. In fact, Turnitin.com is itself a plagiarist’s best friend. Like the Music Man, iParadigms sings to unwitting teachers or administrators “*Oh yeah you got trouble, right here in ---- city, with a Capital T that rhymes with P and that stands for ‘Plagiarism’*”. iParadigms then proceeds to sell them an educationally bankrupt, indeed detrimental, system more harmful than the “think system” of learning to play an instrument championed by Harold Hill.

Copyrights are specifically authorized by the Constitution of the United States. Article I, §8, Clause 8 provides that Congress has the power: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (emphasis added). The essence of the Copyright property is the ability of the owner to exclusively control it, whether to sell it, publish it, prepare derivative works, or to prevent its publication until the Copyright expires. 17 U. S. C. §106; *Harper & Row v Nation Enterprises*, 471 U. S. 539, 564 (1985).

What iParadigms has done by archiving the appellants’ works is not only to take away exclusive control from the appellants, but take the appellants’ works as its own property solely for financial gain. iParadigms refers to student works submitted to it as its property, i. e. “our databases” [87] and “our proprietary database of millions of previously submitted student papers” [both 88, 89]. In view of this “theft” iParadigms has unclean hands. Since fair use is an equitable doctrine, the soiled defendant cannot take advantage of it. See *Maxtone-Graham v Burtchaell*, 803 F. 2d 1253, 1264 (2nd Cir. 1986), cert. denied, 481 U.S. 1059 (1987) [cited with approval in *Sundeman v. Seajay Society Inc.*, 142 F.3d 194, 202 (4th Cir. 1998)].

2. There are numerous “public benefit” facts in dispute

The lower court properly recognized that the “public benefit” is the basic issue behind the “fair use” doctrine [e. g. 55], indeed behind copyright protection *per se*. While the lower court did not specifically reference them, precedents in this Court and the Supreme Court make that vividly clear. For example, in *Sundeman, supra*, 142 F.3d at 203, this Court held: “Courts should also ‘consider the public benefit resulting from a particular use notwithstanding the fact that the alleged infringer may gain commercially.’ ...’ This public benefit typically involves ‘the development of art, science, and industry.’” In *Dawson v. Hinshaw Music*, 905 F.2d 731, 733 (4th Cir. 1990) this Court held:

“This initial observation gave force to the recognized purpose of the copyright laws of providing creators with a financial incentive to create for the ultimate benefit of the public. See *Mazer v. Stein*, 347 U.S. 201, 219, 98 L. Ed. 630, 74 S. Ct. 460 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and the useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.”).

Being an equitable affirmative defense; the burden of proof for fair use is on iParadigms. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994). While some courts have decided copyright fair use by summary judgment, because the issue is so fact specific - *Harper & Row, supra*, 471

U. S. at 588 - summary judgment is the exception, not the rule. Indeed the fact specific nature of the fair use defense is why summary judgment was reversed in *Campbell v Acuff-Rose, supra* and partially why in *Metro-Goldwyn-Mayer Studios Inc v. Grokster, Ltd.*, 545 U.S. 913 (2005).

The lower court made numerous factual findings that ignored the contrary evidence submitted by appellants relating to “public benefit”. For example, the lower court held “Turnitin uses the papers for an entirely different purpose, namely, to prevent plagiarism” [54], “and provides a substantial public benefit” [55], “detecting any efforts at plagiarism by other students” [55], “to be successful in its plagiarism detection services” [56], and “highly beneficial to the public” [57].

The facts presented by appellants, and the inferences therefrom, which must be accepted, demonstrate not only no significant public benefit from the Turnitin system, but public detriment. The main public detriments of the Turnitin system are: (a) Turnitin’s ineffectiveness at identifying plagiarists to the extent that it actually becomes a true plagiarist’s “best friend”, (b) violation of the Family Educational Rights and Privacy Act (FERPA) and the regulations thereunder, (c) publication against the copyright owner’s wishes which violates federally mandated privacy rights, (d) the potential violation of privacy of the copyright holders because of the lax security

associated with the Turnitin system, (e) Turnitin compromises academic integrity and disrupts proper writing pedagogy, (f) Turnitin's ineffectiveness even in matching later submissions with verbatim earlier submissions, and (g) the anti-competitive effect of Turnitin's archival.

(a) Turnitin.com is actually a true plagiarist's "best friend"

The Turnitin.com alleged function – which the lower court accepted as fact³ -- of catching or deterring plagiarists is essentially non-existent for anyone who actually wants to plagiarize. Turnitin catches or deters only the lazy and stupid⁴, and potentially harms legitimate users who want to use verbatim their own works for other purposes.

All one needs to do to avoid the Turnitin system is to paraphrase [93-8, 68-71, 123-6, 128-9]. As paragraphs f) & k) of Dr. Howard's expert report [96, 98] make clear, the document at [94] plagiarizes the one at [93], yet according to Turnitin both are 100% original. As documents by A. V. [68-9 and 123-6], and Ben Donovan [70-1, 128-9] also make clear, an infant or college freshman could quickly and easily plagiarize something from as common a source as Wikipedia yet get an originality report from Turnitin

³ "detecting any efforts at plagiarism by other students"[55].

⁴ According to Dr. Bishop of UCLA "*Turnitin* has some very serious limitations to its ability to fully detect plagiarism. For one thing, *Turnitin* can only detect the most blatantly copied text." [112]

erroneously indicating the plagiarism as 100% original. Also Mr. Smit [143-4, 146] presents testimony to the same effect.

Thus not only does Turnitin not discourage or catch real plagiarists, Turnitin actually encourages real plagiarists [98, ¶ k].

(b) FERPA is violated by Turnitin

The release by a school, or its contractor (like iParadigms), of a student's records or personally identifiable information to unauthorized persons is a violation of 20 U.S.C. § 1232g(b) (1988) and 34 C.F.R. § 99.30 (1988), and thus a violation of public policy.

34 CFR 99.31 provides that a school may disclose personally identifiable information from an educational record of a student to an outside contractor doing a study seeking to improve instruction “only if”:

“(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted”.

Personally identifiable information includes the student’s name, a personal identifier, or other information that would make the student’s identify easily traceable.

Personally identifiable information usually appears on the unpublished manuscripts submitted to Turnitin – [see 78, 127, 130, for

example, which contain the student's name, teacher and class]. The review/study done by Turnitin.com allegedly identifies if portions of the unpublished manuscript submitted have been plagiarized. Typically, a report of this review/study is submitted by the student along with his/her manuscript to the instructor after which the instructor grades it. The review/study by iParadigms is allegedly to improve instruction.

There are two separate violations of 34 CFR 99.31(a)(6)(ii) by iParadigms' implementation of its system.

First, iParadigms makes personal information available to others outside its organization in violation of 34 CFR 99.31(a)(6)(ii)(A) without consent of minor students or their parents. According to the Turnitin.com web site [233, and confirmed by 130 and 140-153], if an outside customer of iParadigms (anywhere in the world) wants a copy of a student's manuscript that has been identified in a review for that outside customer, an individual in the outside customer sends an email to iParadigms requesting the complete manuscript. iParadigms then sends an email to the instructor of the student author with this request. If the instructor of the student author agrees, the complete manuscript is sent. There is no opportunity for the student or her/his parents to object, let alone provide their written consent as

required by FERPA⁵. This is not theoretical, but been done frequently; e. g. see Mr. Smit’s testimony [143-151] and the e-mailed paper of L. M. [130].

Second, iParadigms archives ALL manuscripts submitted to it by students, and refuses not to archive them [229-230]. It is only by archiving the students’ manuscripts that others outside the student’s school would become aware of the manuscripts. The archiving occurs even after the manuscripts have been graded, and the manuscripts are normally retained in the iParadigms data base forever. Even though the review/study by iParadigms was completed prior to grading to allegedly “improve instruction”, the archived copy of the manuscript is not “destroyed when no longer needed for the purposes for which the study was conducted”. This is a clear violation of 34 CFR 99.31(a)(6)(ii)(B).

Thus, the Turnitin system is not a “public benefit”, but is against the public policy contained in FERPA.

(c) The Turnitin system violates other privacy concerns too

This case involves unpublished manuscripts. One of the basic rights of the copyright owner is to determine when – if ever – to publish his/her works. *Harper & Row, supra*, 471 U. S. at 554-5. Public policy is to respect privacy rights. *Griswold v Connecticut*, 381 U. S. 479, 483-5

⁵ See Dr. Bishop’s analysis at [114].

(1965). This right is violated by publishing a manuscript the copyright owner does not want published. *Salinger v Random House, Inc.*, 811 F.2d 90, 92 (2nd Cir. 1987), *cert. denied*, 484 U.S. 890 (1987).

The Turnitin archival of a work – including but not limited to its practice of sending the work to others without the copyright owner’s permission – is an unauthorized publication. This is clear from [83-6]. K. W.’s copyright application that became the registration of [83-5] was filled out indicating that the work had been published. The [86] document, which has the “RECEIVED” stamp of the Copyright Office, explained why the application was filed indicating that the work was published – namely its archival by Turnitin.com. The Copyright Office did not make any changes to the application before issuing it as registration TX 6-495-427⁶, indicating its agreement that the work had been published by Turnitin.com. Thus K. W.’s privacy rights were violated, contrary to the public interest in protecting individual privacy rights.

Finally, iParadigms boldly announces in its “privacy [sic] policy” it has the right to sell anything submitted to it: “personal information in our databases may be included among the transferred assets” [87].

⁶ It would have had a “TXu” prefix if unpublished.

(d) The Turnitin.com system may be easily hacked into, exposing all of the archived works, clearly against the public interest

Mr. Felix has provided a detailed expert witness report [the first four pages of which are 72-5] and attachments which indicate how easy it is to hack into the Turnitin.com system. Both because of the enormous size of the report and attachments, and because its specifics could provide a roadmap for someone to hack into the Turnitin.com system making it even easier to do than it is now, only the first four pages are provided. However, the expert conclusions on page 3 [74], and the basic reasons on page 4 [75], unquestionably demonstrate the lack of integrity of the Turnitin.com system. This demonstrates that millions of works could be retrieved by those it was undesirable to have do so. This could result in harm to thousands of people, including infants, and clearly means that the Turnitin.com system is against the public interest.

(e) Turnitin compromises academic integrity and disrupts proper writing pedagogy

As the expert witness report of Dr. Howard [95-102] makes clear, Turnitin actually is detrimental to the learning process for creative or other writing. Dr. Howard sets forth the reasons for this in paragraphs g)-j) [96-7]. For purposes of summary judgment this clearly establishes a material fact in dispute since apparently iParadigms asserts the contrary.

Compromising academic integrity and disruption of proper writing pedagogy are both obviously against the public interest.

Note that Dr. Howard's views are mainstream. See "Use of Plagiarism Detection Services [like Turnitin.com] poses several compromises to academic integrity and effective teaching..." [103] and "In addition to undermining a general environment of academic integrity, the use of PDSs [like Turnitin.com] can specifically disrupt good teaching of writing." [104] (bracketed material added), written by an independent commission of academicians. Also see UCLA's⁷ Dr. Bishop's academic analysis [107-118]:

"Second, from a pedagogical perspective, I inherently trust my students and do not instantly suspect them all of potentially cheating on written assignments without some evidence that they have engaged in such practices in the past. I have found through experience that the vast majority of students do not engage in cheating, and therefore, automatically requiring all students to submit their papers to *Turnitin* sends the message that the instructor sees the students as 'guilty until proven innocent'". [115]

(f) Turnitin is ineffective even in verbatim matching

Turnitin.com is far from sure even in catching verbatim copying. For example, the last paragraph of the work in the originality report of [127] processed by Turnitin.com on April 20, 2007, is identical to the last paragraph of [78], processed by Turnitin.com on February 21, 2007.

⁷UCLA is a client of iParadigms.

However the last paragraph of [127] is NOT indicated as unoriginal, though it clearly is.

Thus there clearly is a fact issue regarding even the most basic ability of the Turnitin system to detect plagiarism, drawing into question whether there is any public benefit at all associated with Turnitin.com.

(g) iParadigms' archival of student works is anti-competitive

By archiving student works to create “our proprietary database of millions of previously submitted student papers” [88-9] iParadigms engages in anti-competitive activity. By building up, asserting ownership of, and touting this database, iParadigms puts up barriers to competition for anyone else trying to enter the field of plagiarism detection, including someone who might have a system that actually works (unlike Turnitin.com) to catch plagiarists. This discourages the progress of science and the useful arts, in direct contravention of the reason for granting copyrights as Article I, §8, Clause 8 of the Constitution makes clear. Thus Turnitin’s archival not only does not result in a public benefit, it clearly is a public detriment.

(h) Summary

In summary, the lower court was clearly wrong in determining by summary judgment that Turnitin.com “provides a substantial public benefit” [55], functions “to prevent plagiarism”[54], by “detecting any efforts at

plagiarism”[55], and is “highly beneficial to the public” [57]. For this reason alone, the decision below must be reversed.

3. Other “fair use” facts in dispute were resolved against appellants and the lower court’s fair use analysis was legally incorrect

17 U.S.C. § 107 sets forth four non-exclusive factors that must be considered by a court when deciding whether a particular use is fair: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. When evaluating the factors under 17 U.S.C. § 107, the lower court resolved other facts in dispute against appellants, and took an approach that was legally incorrect. “Fair use” is an “equitable rule of reason” to be applied in light of the overall purposes of the Copyright Act; *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448, 454 (1984); see *Harper & Row, supra*, 471 U.S. at 549. That was not done here.

(a) The purpose and character of the use are subject to dispute in one respect and favor appellants in at least one other

With respect to the first factor under 17 U.S.C. § 107, the lower court simply ignored the fact that the purpose of iParadigms’ use was clearly

commercial. iParadigms is a for profit company with millions of dollars of revenue. One of the most important points used to sell its system [87-9] is the constantly increasing database of student submissions. Thus the commercial benefit from archiving the works of students, like the copyrighted works here, is undisputable. "[Every] commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. of America, supra*, 464 U.S. at 451.

With respect to both the "purpose and character" of the use, what iParadigms does is NOT "transformative"; that is it does not add anything to the work. Rather, iParadigms keeps the work in machine readable form – just as it is submitted to it by a student – which it can regurgitate at will. See the deposition of Mr. Smit where he testified that a work he submitted as a "student" to Turnitin was emailed to an "instructor" in the same format that he submitted it [146-7].

The fact that Turnitin may make a "digital fingerprint" of the work is irrelevant. This adds nothing to the work. At most it simply changes exactly how the work is "fixed", that is exactly what computer form it is stored in. It is the same work. 17 U. S. C. §101 defines "copies" protected under the Copyright Act as material objects "in which a work is fixed by any

method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” Existence in a computer in a particular machine readable form is clearly a copy under this definition. *Mai Systems Corp v Peak Computer, Inc.*, 991 F.2d 511 (9th Cir 1993); *Advanced Computer Servs. of Michigan v Mai Systems Corp.* 845 F. Supp. 356 (E. D. Va. 1994). Any changes that iParadigms makes to a work is no different than if a copyrighted book were read on the radio, put on a DVD, or published in French instead of English.

The entire basis for the lower court’s conclusion that Turnitin’s use is “highly transformative” [54] was that the purpose of Turnitin’s use was “to prevent plagiarism”, and that this is different from the purposes of the copyright owners, which the lower court found (without citing any evidence) was “for the purpose of education and creative expression” [54]. The “transformative” holding is erroneous for two reasons.

First, as discussed above, there are facts in dispute as to whether Turnitin is effective to “prevent plagiarism”. If it is not effective, its use cannot be transformative. An imaginary different purpose is irrelevant; only reality counts.

Second, the copyright owners also have plagiarism prevention as a purpose. They accomplish that purpose by limiting the number, and gauging the trustworthiness, of people they allow to see the work, and by keeping the work out of an electronic database they do not control. The students cannot accomplish this purpose when their manuscripts are archived forever in a database that can be easily hacked or sold, controlled by a distant uncaring corporation whose policy is to send the manuscripts to anyone it chooses to send them to.

That is, Turnitin's use cannot be transformative when Turnitin takes exactly the work submitted and sends it to someone totally unknown to the copyright owner or even Turnitin itself [e. g. 130, 150-1], in exactly the format presented. Turnitin says that this is part of its "plagiarism prevention" function, but the recipient can do whatever he/she wants with the work; there is no restriction on the recipient publishing the work under her/his own name, putting it on Face Book with comments humiliating to the author, sending it to criminals, etc. This is especially a problem since information to gain access to the Turnitin system is not policed by Turnitin, and there are literally thousands of access codes available to anyone who has a computer and knows how to use a search engine [209-210].

The lower court found that iParadigms does not “make any use of any work’s particular expressive or creative content beyond the limited use of comparison with other works”. But a use cannot be “limited” when the entire content of an archived work is compared to other student papers about 125,000 times a day (the number of times other student papers are submitted daily), iParadigms retains the right to sell “our proprietary database” [88], including the creative content, to another for any purpose [87], and anything in its database can be sent to another who can use it for any purpose [233].

Thus facts not in dispute relevant to the first factor, such as the commercial purpose of iParadigms’ use, in appellants’ favor were ignored. And there are facts in dispute as to whether iParadigms’ use is transformative. Therefore the lower court erred as a matter of law in concluding that the first factor was in iParadigms’ favor.

(b) The nature of the copyrighted works

This factor is strongly in appellants’ favor, yet the lower court simply ignored the proper elements to be considered under this factor, and found it “either favors neither party or favors a finding of fair use” [55].

The first element ignored by the lower court, which is critical to the fair use analysis, is that all of the works covered by the registrations – indeed all works submitted by the appellants to iParadigms – were unpublished

when submitted. "Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use" *Harper & Row, supra*, 471 U. S. at 555; and "The 'scope of fair use is narrower with respect to unpublished works' because the author's right to control the first public appearance of his expression weighs against such use of the work before its release." *Id.* at 564. Put another way, "unpublished works are the favorite sons of factor two...this particular factor accordingly weighed heavily in favor of appellant" *Wright v Warner Books, Inc.*, 954 F.2d 731, 737 (2nd Cir. 1991) [cited with approval in *Sundeman, supra*, 142 F.2d at 203]. Since the lower court ignored the unpublished element, its entire analysis of factor two is legally ineffective.

The "nature" factor is even more clearly in appellants' favor because of the type of works copyrighted. As paragraphs a) – e) and the Addendum to Dr. Howard's expert report [96, 102] make clear, the works at issue are fiction, poetry, or otherwise highly creative, and therefore worthy of enhanced protection. *Harper & Row, supra*, 471 U. S. at 563. The lower court ignored this too, stating "this factor is of lesser import because the allegedly infringing use makes no use of any creative aspect of the student works" [55]. This is factually incorrect (or in dispute) and legally

impermissible since the entire work, including the creative aspects, are used by iParadigms about 125,000 times a day!

Thus factor two is strongly in appellants' favor, not neutral.

(c) The amount of the copyrighted works used

The entire work is archived by iParadigms [229]. The lower court found – totally unsupported by any facts – “In order to be successful in its plagiarism detection services, it must [use the entire work]” [56]. Not only is this unsupported by fact, it presupposes that iParadigms is “successful” in detecting plagiarism, when appellants' evidence shows that it is not.

The lower court's analysis essentially ignores this factor. It repeats the “highly transformative” [57] disputed factual finding, which has no basis even for discussion when considering factor three. Therefore factor three is also strongly in appellants' favor, and the lower court's conclusion “either favors neither party or favors a finding of fair use” [57] is wrong.

(d) The effect of the use upon the potential market for or value of the works

The major error made by the lower court in evaluating this factor was to require proof of the present existence of evidence of actual damage. “Appellants have failed to present any evidence of harm” [57], and “this type of harm is entirely speculative” [59]. However, this factor does not relate to damages (appellants are seeking statutory damages, which do not

require proof of actual damage); it relates to potential effect. “The mere absence of measurable pecuniary damage does not require a finding of fair use.” *Marcus v Rowley*, 695 F.2d 1171, 1177 (9th Cir. 1983) (finding no fair use). Factor four specifically uses the word “potential” therein, and nowhere uses the word “damage”. The potential effect can even be with respect to derivative works. *Harper & Row, supra*, 471 U. S. at 568.

The fact that the copyright owners do not presently compete in the same market as the infringer – or even if they have no intention of ever competing in the market or exercising rights they might have – is irrelevant. In *Salinger v Random House, supra* the copyright owner had no intention of allowing his unpublished manuscripts to ever be used commercially, yet the fourth factor favored him. In *Pacific & Southern v Duncan*, 744 F. 2d 1490, 1496 (11th Cir. 1984) the plaintiff and defendant were in entirely different markets, but still the fourth factor favored the plaintiff. Further, in *Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1242 (D. Col. 2006) the fact that “the infringing parties are exploiting a market for movies that is different from what the Studios have released into and for an audience the Studios have not sought to reach” was found to indicate that the fourth factor was in the copyright owner’s favor. Therefore the fact that the appellants are not now in the “plagiarism detection” business is irrelevant. If

they were to enter that business, they wouldn't want a competitor to have their copyrighted materials in a database it controls!

The “potential market” for the student works is devalued since no one will buy a plagiarized work, and once in Turnitin's archives it will be (if the Turnitin system actually works) indicated non-original if submitted again verbatim. Newspapers and magazines purchase articles from freelance writers all the time (as one of hundreds of examples see www.undercover-medicine.com), and have no age requirement for the submitter. If a student submits a verbatim unpublished manuscript used in high school, or uses a verbatim part thereof as the basis for a derivative work (specifically protected and authorized under §106(2)), and the work is checked against Turnitin.com, assuming that the Turnitin.com system functions the work will be found to have been plagiarized, completely destroying its marketability.

With respect to the potential “value of” the copyrighted work, the situation is even more serious. For example, essays submitted by college applicants are commonly run through Turnitin.com. Therefore if a high school student produces a derivative work with verbatim sections from an unpublished manuscript she/he produced in a school course⁸ – as he/she has every right to do – that is used as a college essay, and again assuming the

⁸ Some high schools have classes or class components on writing college entrance essays.

Turnitin.com system actually works, the work will be found plagiarized. What chance does the student have of getting into that college then? Thus, not only is the “value of” the paper destroyed, there are potentially enormous consequential losses in the future. It is well known that getting into and graduating from prestigious colleges and universities greatly enhances one’s earning ability, therefore there could be significant economic loss from iParadigms’ archiving of a student’s unpublished manuscript in this situation.⁹

The lower court dismissed these effects “based on the manner in which the Turnitin system operates” [59]. However, the way in which the Turnitin system works in fact causes the concern for two reasons, one improperly analyzed by, and one apparently unknown to, the lower court.

First, if the originality report references only one prior work and that is one from an institution that the student did previously attend, that does NOT mean the work was not plagiarized. Thousands of other students may attend the same institution, and the applicant could have copied it from

⁹The fact that it MAY be possible to somewhat mitigate the consequences in any of these scenarios by getting more detailed information from Turnitin, the high school, or other sources, is irrelevant. The first impression is negative and may be impossible to recover from. Also, the organization may never even tell the student what happened, leaving no possibility for mitigation. Requiring the student to explain the situation in advance would also be impractical and prejudicial.

another of these thousands of students¹⁰. Also, why would the student want the college to know that her/his admission essay was based upon an earlier work, something alone that might damage his/her chances?

Secondly, it is entirely possible that an originality report could turn up a number of different references, especially if the essay quoted another source [see 127]. The prior high school submission might not even then be recognized as potentially the applicant's. The whole point is, the student copyright owner has lost all control of his/her work, and it is she/he that is the person to judge what is to be done with his/her work, and not to be delegated to an uncaring, unresponsive, corporation.

There are also potential non-monetary adverse effects, e. g. being deprived of attending the college of one's choice whether or not there are associated monetary benefits. Non-monetary factors caused the Court in *Weissman v Freeman*, 868 F. 2d 1313, 1326 (2nd Cir. 1989) to find that the 4th factor favored the copyright owner.

Whether the works will ever be sold for money does not in any way determine how the fourth factor leans. Only "potential" counts, and at least one appellant has already received an inquiry about possible authorized publication of his copyrighted work [69]. Even if the copyrighted works are

¹⁰ For example Desert Vista High School, which E. N. and M. N. attend, has 2935 students.

examples of awful writing, they could be collected into an anthology of “What not to do in creative writing” which could be sold – if not determined unoriginal by Turnitin.com.

While the fourth factor is thus also clearly in appellants’ favor, the Court could conclude that it contains some factual issues that should be resolved before a total analysis is made. However in no way can the fourth factor summarily be considered to favor the infringer iParadigms.

e) The primary cases relied upon by the lower court are irrelevant

In its “fair use” analysis, the lower court heavily relied on *Sundeman, supra*, *Perfect 10 v Google*, 508 F.3d 1146 (9th Cir. 2007)¹¹, and *Bond v Blum*, 317 F. 3d 385 (4th Cir. 2003). However, these cases are factually so different from the present situation as to be virtually irrelevant except for general principles of law¹². As noted above, the fair use analysis is always very fact specific. *Campbell v Acuff-Rose, supra*.

Bond v Blum related to use of an unpublished manuscript in a child custody court proceeding to demonstrate that the step father of the minor children was a murderer, and therefore an unsuitable parent. Unlike the present case the use was completely non-commercial, only the factual

¹¹ The lower court cited it as 487 F.3d 1146, but it was amended 12/3/07.

¹² Which appellants have extensively cited *Sundeman* for.

information in the manuscript was used in any way, and there was a clear public benefit in having all of the facts available to a Court of law to determine the welfare of minors.

Sundeman is just as far afield. It involved a never published single public interest scholarly analysis using only 4-6% of an unpublished copyrighted manuscript, a single reproduction of the manuscript to prevent it from degrading because of its fragile nature, and another single copy to allow evaluation of its authenticity.

In neither *Bond* nor *Sundeman* was an unpublished manuscript used 125,000 times a day to compare its total content against that of other manuscripts, nor was a complete copy of it available to be emailed to others across the world, nor did the “infringer” profit from its use – all of which exist here.

Perfect 10 is even more far removed. That case related to a preliminary injunction, therefore the copyright owner bore the burden of proof on fair use – opposite to the situation here. There was no dispute that the Google search engine provided a public benefit – also specifically contrary to the situation here. Very significantly, it also related to works that

had already been published, which played a major part in the Court's holding¹³.

Rather, this case is most like *Stewart v Abend*, 495 U. S. 207, 236-8 (1990) and *Harper & Row, supra*. In both, the finding was no fair use. When the orderly analysis required by the Supreme Court is made, the first through fourth factors are clearly in appellants' favor, although some aspects of the fourth may require a trial.

4. Summary Of Fair Use

In summary, the lower court erred in granting summary judgment to iParadigms on "fair use" because there are material facts in dispute, and because those material facts not in dispute favor appellants.

5. The Click Wrap Document Is Not An Enforceable Contract

Contrary to what one would expect looking at parts of the lower court's decision [48], there is no dispute that it is possible to enter into a contract using a computer. What are intensely in dispute are (a) is the

¹³ 508 F. 3d at 1167: "the district court found that Perfect 10's images were creative but also previously published. The right of first publication is 'the author's right to control the first public appearance of his expression.'" *Harper & Row*, 471 U.S. at 564. Because this right encompasses 'the choices of when, where, and in what form first to publish a work,' *id.*, an author exercises and exhausts this one-time right by publishing the work in any medium....Once Perfect 10 has exploited this commercially valuable right of first publication by putting its images on the Internet for paid subscribers, Perfect 10 is no longer entitled to the enhanced protection available for an unpublished work."

alleged contract relevant since this is an action for tort, (b) is complete elimination of liability in the alleged contract here unconscionable, (c) has any contract been rendered legally void by the infant appellants, (d) is iParadigms estopped from asserting an alleged contract in opposition to a claim of copyright infringement, and (e) was there assent by appellants.

(a) The alleged contract is irrelevant since this is an action in tort

Appellants are not seeking any benefits under a contract.¹⁴ Rather, they seek redress for copyright infringement, a tort. *Milwaukee Concrete v Field Mfg. Co.*, 8 F.3d 441, 447 (7th Cir. 1993). Where a suit is in tort, the fact that a contract was signed between an infant plaintiff and an adult defendant is irrelevant. *Stroupes v. The Finish Line, Inc.*, 2005 U.S. Dist. LEXIS 6975 at *14 (E.D. Tenn. 2005) ("A minor suing an employer for sexual harassment is not suing on the contract [for employment]."); *Foss v Circuit City Stores, Inc.* 477 F. Supp. 2d 230, 237 (D. Me. 2007) ("This proposition misconstrues the nature of the lawsuit. Foss is suing on statutory grounds independent of the Agreement, not upon any provision or action under the contract."); *Douglass v Pflueger Hawaii, Inc.*, 135 P. 3d 129, 147-8 (Hawaii 2006) [concurring opinion by Justice Acoba] (a minor suing for sexual harassment is not bound by an arbitration clause in a contract).

¹⁴ Making the *Williston*, *infra*, cite by the lower court irrelevant.

(b) The complete elimination of liability in the alleged contract here is unconscionable

Minors/infants (according to VA §1-203 those under 18) are treated differently under the law than adults. This is clear from virtually every law and practice in Virginia. Infants are required to go to school, they have a separate and confidential criminal justice system, their privacy rights are specially protected by State and Federal Law, and they must file and defend civil suits using a “next friend” [*Herndon v St. Mary’s Hospital*, 266 Va. 472, 587 S.E. 2d 567, 570 (2003)]. This Court’s own Local Rules recognize their distinct and protected status in requiring that infants not be identified in any court filing. In contracts too infants are protected by the law so that crafty adults cannot take advantage of them. Therefore even if the alleged contract is relevant, it is not enforceable here.

Initially, it should be clearly recognized what iParadigms is trying to do – eliminate all possible liability for anything. iParadigms says the infant appellants have no right to sue for copyright infringement because the click wrap document comprises a complete elimination of any liability in Virginia. The only citations by the lower court in support of this proposition are *Regency Photo v America On Line*, 214 F. Supp. 2d 568, 573 (E. D. Va. 2002), and *Blue Cross of Southwest Virginia v McDevitt & Street Co.*, 234

Va. 191, 360 S.E.2d 825 (1987). These cases do not support the lower court's conclusion, and the real law in Virginia has been ignored.

While *Regency Photo* and *Blue Cross* both do say that a limitation on liability is possible in Virginia, neither one comes close to holding what the lower court relied on them for – that all liability can be eliminated under all circumstances.

In both *Regency Photo* and *Blue Cross*, the defendants did not have all liability eliminated; the plaintiffs still had some recourse. In *Regency Photo* the limitation of liability clause was mutual, and the defendant's liability was up to the amount of money the plaintiff had paid. In *Blue Cross* all parties (an insurance company, architect, and construction contractor) had purchased insurance policies, and liability was limited to the amounts of the insurance policies. Also in both cases, all parties to the contracts were “experienced and sophisticated businessmen” [*Regency Photo*, 214 F. Supp. 2d at 572].

Only when all parties are sophisticated and have roughly equal bargaining power are limitations on liability enforced, and in such cases liability is not completely forgiven. In both *Parker-Smith v Sto Corp.*, 262 Va. 432, 551 S. E. 2d 615, 618 (2001) and *Envirotech Corp. v Halco Eng'g. Inc.*, 234 Va. 583, 593-4, 364 S. E. 2d 215, 220-21 (1988), the Virginia

Supreme Court made this clear. In *Parker-Smith* the Court enforced a limited warranty because “Parker-Smith did not claim that there was grossly unequal bargaining power between Sto and the beneficiaries of the warranty when the contract was formed”, and in *Envirotech* the Court enforced a contractual damage exclusion because “Noting that the principals of the parties to this contract were ‘sophisticated businessmen with access to legal counsel’ the trial court ruled that the contract was not unconscionable”.

Here, the situation is entirely different. The appellants are infants who were required by their schools to submit documents to the Turnitin.com website, while iParadigms is a sophisticated company run by PhDs. Thus the enforceability of any contract limitation of liability is clearly outside the black and white approach of *Regency Photo* and *Blue Cross*.

Under Virginia law any contract here is clearly a contract of adhesion. A "contract of adhesion is a standard form contract, prepared by one party and presented to a weaker party -- usually, a consumer -- who has no bargaining power and little or no choice about the terms." *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (2001), 2001 WL 112107 (No. CL00-236); *Karnette v Wolpoff & Abramson, LLP*, 444 F. Supp. 2d 640, 647 (E. D. Va. 2006).

As a contract of adhesion with a consumer, the click wrap document must be strictly evaluated to make sure that none of its terms are unconscionable. This is in part so because, as noted in Robert A. Hillman, *A tribute to Professor Joseph M. Perillo: Rolling Contracts*, 71 FORDHAM L. REV. 743, 746-7 (2002): “Finally, the consumer expects the law to protect her from egregious terms. In short, the seller presents a form largely incomprehensible to the consumer on a take-it-or-leave-it basis, and the consumer has good reason not to read the form.”

Here, the attempt to use the click wrap document to preclude any user of Turnitin.com from ever being able to collect damages or seek injunctive relief no matter what iParadigms does is clearly such an unconscionable term. iParadigms’ interpretation means that iParadigms can steal the appellants’ intellectual property rights and use them for whatever it wants, or sell or give them to another without an accounting; or iParadigms can sell to spammers the name and email information it requires entry of to access its website; or iParadigms could even sell everything submitted to it by infants (including name, high school, and related information) to known criminals. iParadigms’ view is that it can do any of these yet appellants have no recourse except to stop using the site (no recourse at all)!

As set forth in *Carlson v. General Motors Corp.*, 883 F.2d 287, 293, 295 (4th. Cir. 1989), *cert. denied*, 495 U.S. 904 (1990), in this Circuit:

“courts have developed ‘tests’ of unconscionability which look, as a matter of necessity, to the presence or absence in a given setting of certain oft-encountered ‘indicia’ of unfair bargaining. One frequently cited case holds, for example, that unconscionability ‘generally . . . [includes] an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.’ *Williams v. Walker-Thomas Furniture Co.*, 121 U.S. App. D.C. 315, 350 F.2d 445, 449 (D.C.Cir. 1965). In this circuit, we apply a similar test.

...the factors determining ‘unconscionability’ are various: the nature of the injuries suffered by the appellant; whether the appellant is a substantial business concern; the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause . . . all of which constitute relevant evidence of whether their transaction was indeed tainted by an absence of meaningful choice.”

Applying the criteria of *Carlson* here, it is clear that the infant appellants had no bargaining power or meaningful choice, were infinitely less sophisticated than iParadigms, and that depriving the infants of all rights to claim damages – even under Federally recognized Copyright law – is grossly unreasonably favorable to iParadigms. It is not imagined how a contract term could be more unequal.

The fact that any “contract” is a click wrap contract means that the “unconscionable test” is statutory. VA §59.1-502 *et seq*, which makes “click wrap” agreements normally enforceable in Virginia, specifically

excludes unconscionable terms. See VA §59.1-502.9: “Mass-market license... A term is not part of the license if: (1) the term is unconscionable or is unenforceable under § 59.1-501.5 (a) or (b)”. VA §59.1-501.5 provides: “(b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract...”

In *Derby v Derby*, 8 Va. App. 19, 24, 26, 30, 378 S. E. 2d 74, 77 (1989), citing *Hume v United States*, 132 U. S. 406, 411 (1889), a contract was held unconscionable under far less severe circumstances than here (namely where there was simply inequality in value).

The click wrap document is also unconscionable because it violates a fundamental public policy embodied in FERPA. Attention is directed to the above discussions of FERPA (with respect to “public benefit” and “fair use”), and VA §59.1-501.5(b) (immediately above).

(c) The infants properly voided any contract

Not only is the “limitation on liability” in the click wrap document unconscionable considering the parties and their positions here, the lower court was wrong as a matter of law in finding that the infant appellants could not void any contract that might exist. The lower court cited only two authorities for its position, *MacGreal v Taylor*, 167 U. S. 688, 701 (1897),

and 5 Williston on Contracts §9:14 (4th ed. 2007) [52-3]. Neither supports the lower court's position, nor negates the clear Virginia law to the contrary.

The law with respect to adults enforcing a contract against infants is crystal clear in Virginia. There are two cases that completely control, and dictate the entire law with respect to infants in contract actions. They are *Zelnick v Adams*, 263 Va. 601, 561 S. E. 2d 711 (Va. 2002) [*Zelnick I*], and *Zelnick v Adams*, 269 Va. 117, 606 S. E. 2d 843 (Va. 2005) [*Zelnick III*]. These cases resulted from a contract between an infant and an attorney, which required the payment for services that had been actually rendered by the attorney to the infant. The infant voided the contract, and the attorney sued for recovery of his fees.

In *Zelnick I*, the trial court had found that the contract was properly voided because it was not for “necessities”, which the court interpreted as food, housing, education, and clothing. The Virginia Supreme Court stated that determining whether a contract is for “necessities”, and if any performance or payment is required by an infant, requires a three part analysis. First, as a matter of law, the court must determine whether the “things supplied” (i. e. goods or services) under the contract are in the general class of necessities, that is are those goods or services “necessary to enable [an infant] to live according to his real position in society” [263 Va.

at 607]. If the answer to that question is “no”, then the contract is void. If it is “yes”, then at least one of two factual issues must be addressed.

The first factual issue to be addressed according to *Zelnick I* is whether the “things supplied” are actually, factually, necessary even though they fall within the general class of things that could be considered necessities. Even if this question is answered “yes” however, there is still a second factual issue. As held in *Zelnick I*, “if the plea of infancy is not sustained, the claimant is not entitled to enforcement of the express contract. Rather, as we have previously held, “[e]ven in contracts for necessities, the infant is not bound on the express contract but on the implied contract to pay what they are reasonably worth.” [263 Va. at 610].

In *Zelnick I*, the Supreme Court remanded because it found that legal services possibly could be, as a matter of law, considered necessities.

In *Zelnick II*, on remand the trial court had found – addressing the first factual issue – that the legal services in the case at hand were not necessities [therefore it didn’t have to address the second factual inquiry]. The Supreme Court in *Zelnick II*, affirmed the trial court’s determination. Pursuant to its instruction in *Zelnick I*, that “[S]hould the trial court upon remand hold that the doctrine of necessities does not apply because the evidence adduced does not support the claim, the contract is avoided and no award shall be

made.” [263 Va. at 612], the Court then went on to confirm the contract void [269 Va. at footnote 3].

Applying *Zelnick I* and *Zelnick II* to this case it is clear that the click wrap document cannot be enforced. This Court should determine as a matter of law that the submission of two copyrighted works each by two appellants, and one each by the other two appellants, to an alleged plagiarism review company could not possibly be a necessity. Even if the argument is made that it is part of the appellants’ education, it is such a small part as to be infinitesimal, *de minimis*, and inconsequential [worth 77¢, 210]. The appellants were fully and properly educated in their lives before 2006 when they for the first time (each just in one course) had to submit papers to Turnitin. Therefore as a matter of law the claim of infancy must be sustained and the click wrap document held avoided.

Although nowhere in either *Zelnick* case does the Virginia Supreme Court make a distinction between an infant plaintiff and an infant defendant, the lower court did here citing only *MacGreal* and a textbook quoted out of context and with no recognized relationship to Virginia law.

MacGreal is a case with an extraordinarily complex factual situation, and 1800s language that is difficult to understand. However, its ultimate holdings are exactly what appellants submit is the correct law – the law of

the state [actually D. C. in this case] involved is applied, and the right of an infant to void a contract is unassailable, only the consequences being subject to determination. In *MacGreal* the infant was allowed to void the land contract she was sued under, and keep what was fairly hers, but had to return to others what was still in existence and fairly theirs. The *MacGreal* holding was in complete conformance with the earlier case of *Sims v Everhardt*, 102 U. S. 300 (1880), which it cited.

The *Sims* factual situation was much simpler. Ann Sims was an infant when she conveyed a deed to property to Everhardt. She subsequently revoked the conveyance in a time frame the Supreme Court found reasonable under Indiana law, and when Everhardt would not vacate the property, Sims sued. The Supreme Court reversed the lower court and rendered judgment for Sims [102 U. S. at 313]. The fact that she had to make accommodation for the consideration she had received did not affect the result, namely her unfettered right to void the contract.

That appellants' interpretation of *MacGreal* and *Sims* is correct, and contrary to lower court's holding, is made clear by a Supreme Court decision subsequent to *Sims* and *MacGreal*. In *Myers v. Hurley Motor Company*, 273 U.S. 18 (1927) the Court applied "general principles" since there was no relevant case in the jurisdiction where the events took place. The Court

cited *Sims* at 273 U. S. 22, and *MacGreal* at 273 U. S. 23, in holding that even where an infant misrepresented his age in purchasing a car he had every right to sue for return of the purchase price. The fact that the defendant was entitled to offset (up to the car purchase price) for significant damage the infant did to the car was irrelevant to the infant's right to void the contract of purchase [273 U. S. at 27].

That Virginia follows this majority rule is clear from the only reported Virginia case on point where the infant was a plaintiff [which case shows that the *Zelnick* cases are clearly applicable where the infant is a plaintiff]. In *Fleming v Virginia Discount Auto Sales, Inc.*, 36 Va. Cir. 550, 554, 557 (Richmond 1972) the 20 year old infant plaintiff, Fleming, entered into a contract to buy a car and paid \$1800. He sued to have the contract of sale rescinded, and for return of the \$1800, even though he used the car for a considerable period of time. The Court rescinded the contract and ordered return of the \$1800 to the plaintiff Fleming. The Court found -- while discussing *Stallard v Sutherland*, 131 Va. 316, 318 (1921) -- that the only way that an infant can be prevented from voiding a contract is if the infant had committed actual fraud when entering into it. Analyzing and distinguishing *Stallard*, the Court found that not only would the infant have to misrepresent his age, but that he would have to hold himself out to the

world at large as being of the age of majority, to commit fraud. In other words, even a misrepresentation about his age *per se* would not defeat his right to void the contract [in accord with *Sims*, 102 U.S. at 301].¹⁵

Further, the quote from Williston is not the law in Virginia, as the *Zelnick* cases make clear; but even if it were, it is irrelevant. Appellants are not suing under the contract.

Even though irrelevant since appellants are suing under tort and not contract, if iParadigms wants its originality reports back – the only thing iParadigms gave the student appellants (NOT grades in their courses, because the schools gave them)¹⁶ -- it can have them. The originality reports never benefited the student appellants in any way. But regardless of whether the infant students return the originality reports or not, they had every right (which they have done – [25]) to void any contract with iParadigms. Therefore the click wrap document, for the above reasons alone, based upon facts about which there is no dispute, provides no defense to copyright infringement.

¹⁵ Of course here there was no misrepresentation by the high school student appellants that they were the age of majority.

¹⁶ Appellants did not obtain standing to sue by entering into a contract – they obtained it by iParadigms archiving & using their unpublished manuscripts.

(d) iParadigms does not even have the right to raise the click wrap document

In California in 2006, iParadigms filed a declaratory judgment complaint [154-161] against an organization including one of the appellants here [A. V.]. The declaratory judgment complaint submitted as Exhibit 1 the same “contract” [212-3] that iParadigms asserts now precludes judicial intervention. That is, in its own complaint, iParadigms completely rejected its present position that the click wrap document precludes a determination of the tort of copyright infringement. Instead, iParadigms specifically represented to the California court that it should consider the issues of copyright infringement/fair use. For example, in paragraph 17 [159] of its complaint iParadigms said:

“A judicial declaration on these issues [copyright infringement/fair use] would serve the interest of justice. A declaration would avoid a multiplicity of actions by enabling parties to understand their respective rights and duties with respect to the Turnitin® system, without the need for further litigation (for example, each time a student member of MCSR or other students at McLean High School disputes the lawfulness of Turnitin®).” (bracketed material added).

The iParadigms complaint [154-161] is clearly a judicial admission that bars iParadigms from taking its present position. iParadigms cannot say in a Complaint that justice requires the tort of copyright infringement be determined by a court, and then in an Answer say that such a determination

cannot be made by a court considering the same click wrap document [212-213] that was Exhibit 1 to the iParadigms Complaint.

This Court can, as a matter of law since there are no facts in dispute, determine that the representation by iParadigms in its California complaint comprises statements of fact, and/or waivers of any defense based upon the click wrap document. See *Meyer v. Berkshire Life Insurance Co.*, 372 F.3d 261, 264 (4th Cir. 2004):

“Judicial admissions are not, as Berkshire claims, limited to affirmative statements that a fact exists. They also include intentional and unambiguous waivers that release the opposing party from its burden to prove the facts necessary to establish the waived conclusion of law.”¹⁷

The lower court never even considered the issue of judicial admission, although it was vigorously argued by appellants. But in its opposition, iParadigms argued that a representation of fact or waiver in a pleading in one suit cannot be used as a judicial admission in another. That is totally incorrect. In *Geonix Corporation v. Norritech*, No. 97-1225 (4th Cir. 08/19/1997), 1997.C04.0001920 <http://www.versuslaw.com>, this Circuit specifically held a statement in a bankruptcy pleading was conclusive in a

¹⁷ In footnote 2, the Court in *Meyer* referenced the following with approval: “See *Major v. CSX Transp., Inc.*, 170 F. Supp. 2d 563, 567 (D. Md. 2001) (explaining that a statement that “crew error . . . was a substantial legal cause of [a] collision” is more than “a mere fact”; “[i]t is a legal conclusion in the nature of a stipulation excusing the need to produce evidence.”).”

subsequent suit. In *Coral v Gonse*, 330 F.2d 997, 999 (4th Cir. 1964) this Court stated that if the District Court had found that a statement was a judicial admission the result would be “foreclosing a subsequent action with an inconsistent allegation”. [Since the District Court had not held that, however, a subsequent action wasn’t foreclosed.] In *Northern Insurance Company of New York v. Baltimore Business Communications, Inc.*, 68 Fed. Appx. 414, 2003 WL 21404703 (4th Cir. 2003), this Court cited with approval *Hardy v. Johns-Manville Sales Corp.*, 851 F.2d 742 (5th Cir. 1988). In *Hardy*, 851 F. 2d at 745, the Court held:

“... there is a well-established rule that factual allegations in the trial court pleadings of a party in one case may be admissible in a different case as evidentiary admissions of that party.”

The law is the same virtually everywhere else. For example, in *Great American Indemnity Co. v. Rose*, 242 F.2d 269, 272-3 (5th Cir. 1957) the Court applied a statement in a pleading in one case to another as long as the party knew of the statement, and it was not just drafted by an attorney without the party’s knowledge. With the same result is *Fuller v. King*, 204 F.2d 586, 590-1 (6th Cir 1953). Here, Dr. Barrie, CEO of iParadigms, specifically approved paragraph 17 of iParadigms’ Complaint [174].

Since there are no facts in dispute, and since as a matter of law the representations, waivers, and facts set forth in iParadigms’ Complaint

establish that the tort of copyright infringement must be litigated, the click wrap document provides no defense to iParadigms.

(e) Appellants never agreed to anything in the click wrap document

The lower court found that the click wrap document was a contract. As proven above, whether or not it legally was a contract it does not shield iParadigms from appellants' copyright infringement action. However, it is respectfully submitted that in actuality the click wrap document never was a contract assented to by appellants.

When the appellants reached the screen with the click wrap document first paragraph [207-8, 223] they were told "Please read our user agreement below. Select 'I agree' to complete your user profile". The icon they clicked on also indicated simple creation of the user profile "I agree – create profile". They did not click "I agree to the terms and conditions".

Thus, at best from iParadigms standpoint, whether there was assent was ambiguous, and ambiguity is always construed against the drafter in Virginia (let alone when one party is an infant). See *Karnette, supra*, 444 F. Supp. at 647: "It is axiomatic that ambiguity in a contract is construed against the drafter". Doing that, in *Karnette* Judge Payne denied a motion to compel arbitration "Notwithstanding the federal policy favoring" it.

That assent to the click wrap document at issue was at best ambiguous is also made clear by changes iParadigms made to the sign-on procedure after this suit was filed. The changed iParadigms sign-on said [234, 208] “Please read our user agreement below **and agree or disagree to its terms and conditions:**”, and “I agree – **continue**” or “I disagree – **logout**”. (Emphasis added) This is an admission by iParadigms that the former logon “Select I agree to complete your profile” was *not* unambiguous assent to the terms and conditions, therefore there could not be the necessary assent to create a contract [see *Phillips v Mazyck*, 273 Va. 630, 635-6, 643 S. E. 2d 172, 175 (2007)].

VII. CONCLUSION

In conclusion: (1) The lower court’s summary holding of fair use must be reversed, and the case remanded for trial on the issue of copyright infringement. (2) As a matter of law, the lower court’s finding that the infant appellants entered into a contract relevant to the tort of copyright infringement, or an enforceable contract that they could not void, and that was not unconscionable, must also be reversed and any defense to copyright infringement based upon contract dismissed.

VIII. REQUEST FOR ORAL ARGUMENT

Appellants hereby request oral argument.

Respectfully submitted

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Certificate of Service

I hereby certify that on June 22, 2008 two true and correct copies of the foregoing was sent by first class mail, postage prepaid, to James Rittinger, Satterlee Stephens Burke & Burke LLP, 230 Park Ave., Suite 1130 New York, NY 10169.

By:

Robert A. Vanderhye
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1424

Caption: A. V. et al v iParadigms, LLC

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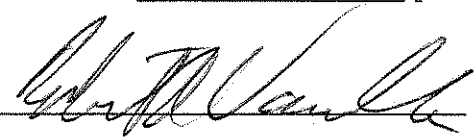
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